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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **KENNETH PAUL YORK,** **Defendant and Appellant.**	**A128201** **(Contra Costa County Super. Ct. No. 50904193)**

Kenneth Paul York was convicted of first degree murder (Pen. Code, § 187),[1] attempted residential robbery (§§ 211, 211.5, subd. (a), 664), residential burglary (§§ 459, 460, subd. (a)), and assault with a firearm. (§ 245, subd. (a)(2).) The jury also found true the special circumstances alleged in the information that the murder was committed while York was engaged in the commission or attempted commission of the crimes of burglary and robbery. (§ 190.2, subd. (a)(17)(A), (G).)

York seeks reversal of his conviction, arguing that the trial court improperly permitted the jury to hear evidence of prior home invasions York had allegedly committed and that the prosecutor engaged in misconduct by eliciting this evidence and referring to it in his closing argument. York also contends that various jury instructions on conspirator liability were legally erroneous. We find none of York's contentions persuasive. We therefore affirm the judgment.

[1] All further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2004, at approximately 1:10 a.m., officers from the Pleasant Hill Police Department responded to a report of a shooting at an apartment on Golf Club Road. When they arrived at the apartment, the police found Michael Fidler on the ground in the entryway. Fidler was suffering from a gunshot wound and was either dead or mortally wounded. He was later pronounced dead at the scene.

The officers entered a bedroom behind Fidler's body and found a pistol-grip shotgun, marijuana scales, bundles of cash, a marijuana cigarette, and baggies of loose marijuana in plain sight. After obtaining a warrant, the officers searched the bedroom closet and found between six and seven pounds of marijuana and over $8,000 in cash.

James Connelly was Fidler's roommate. He testified Fidler sold large quantities of marijuana out of the apartment and kept thousands of dollars in cash in his home. To protect himself, Fidler bought weapons, including a pistol-grip pump shotgun he kept under his bed. Fidler also studied martial arts.

On the night of May 9, 2004, Connelly was in bed with his girlfriend in the apartment he shared with Fidler. Shortly after Connelly went to sleep, someone pushed his bedroom door open. A black man with a bandana mask pointed a gun at Connelly, ordered him out of bed, and demanded that Connelly "[s]how [him] the shit." The man put the gun—a small chrome revolver—on the back of Connelly's neck as the latter walked to Fidler's room. Connelly entered Fidler's room where Fidler was asleep in bed.

The man pointed the gun at Fidler and again said, "Show me the shit." Fidler woke up and reached under his bed. The masked man charged at Fidler, and Fidler grabbed the intruder's hand. The two men grappled with each other in a "big tangle [that] went out of [Fidler's] room [and] into the living room." The masked man hit Fidler repeatedly with the gun.

Connelly went to follow the two men into the living room, at which point he saw a second intruder. The second man was unmasked, and Connelly made eye contact with him. Although he could not be 100 percent sure, Connelly testified that the second intruder looked like York. The second intruder closed the door to the bedroom, where

Connelly remained, and then Connelly heard "tumbling and wrestling sounds" coming from the living room. Not long after, he heard a series of small caliber gunshots.

Connelly remained in Fidler's bedroom for a short while, but left the room when he heard his girlfriend on the phone with the police. In the living room, Connelly saw Fidler seated on the floor. Fidler had a bullet hole in his stomach. Shortly thereafter, the police arrived.

Bryan Hart was a friend of York's, and he also knew Ricardo "Junior" Perez. York and Junior used property near Nevada City for growing marijuana. For two months, Hart lived on the property and took care of it. One day York came to the Nevada City property, and Hart heard him tell Junior that he (York) had been with a "nig" when something bad had happened. Hart understood York to be referring to a black man who had been with him when things had gone bad. Around this same time period, Hart saw a "stainless" .38-caliber revolver on the property. On the day York arrived at the property, Hart saw him burn some clothes, and he witnessed York leave the property and come back later. Hart did not see the gun again after York returned.

Logan Lackey, who had gone to high school with York and Junior, also lived on the Nevada City property. One day York arrived at the property and seemed panicky. Lackey saw a "[c]hrome or polished" revolver that day. York said he needed to get rid of the gun, and a number of people discussed the best way to dispose of it. York later told Lackey someone had gotten shot with the gun.

Lauren Lackey Perez is Junior's wife and Logan's sister. She met York, Junior, and Tyson Morehead in high school. One night in May 2004, Junior received a call from York, after which he left and said he was going to York's house. He returned 30 minutes later and went to sleep. Junior went up to the Nevada City property the next morning, and when he returned a day or two later, he showed Lauren a newspaper article about Fidler's murder and told her York and Morehead "did it."

York frequently talked about robbing people. He bragged to those around him about the idea of "jacking" people. Lauren Perez did not take York's talk seriously. Nor did Junior's sister, Tesse Perez, who was dating York at the time of the murder. Tesse

did not pay much attention to York's talk of robbing dealers because that was "just how he kind of talked. That was his mentality. He was always talking about doing things like that." In the months before the murder, Junior Perez heard York "rant and rave" several times about robbing a friend's marijuana supplier in Pleasant Hill, but Junior was unconcerned because he thought "that was Kenny being Kenny."

Morehead, a black male with very dark skin, went to high school with York and Junior Perez. York and Morehead went to Junior's apartment on Mother's Day in May 2004, and York ranted and raved about robbing a Pleasant Hill drug dealer. Morehead said he was "hungry," which meant he needed money. That afternoon or evening, York called Junior and said he was staking out the drug dealer's house. York then called Junior at 3:00 a.m. and asked Junior to come to his house. Junior went to York's place, and he saw York and Morehead "standing there in shock[.]" York asked Junior to take a duffel bag up to the Nevada City property, and Junior agreed to do so. York told Junior, "Shit went bad."

Junior drove up to the Nevada City property the next morning, and York arrived either later that day or the next day. York brought a newspaper article and a chrome handgun with him. Junior read the article and York told him, "Shit went bad and the guy got shot." Junior saw York open the duffel bag and remove some clothing and Morehead's wallet. York burned the items, and then asked if anyone wanted to come with him to hide the gun he had pulled from his waistband. York left with the gun and was gone for two or three hours.

York told Tesse Perez about the incident before the newspaper article was published. He told her he had gone "to go jack somebody[,] that things went bad and the gun had gone off." After she read the article, Tesse realized someone had been killed. She asked York why he hadn't told her about the murder, and he said he did not want her to look at him differently. He later explained to her that he and Morehead had staked out the apartment of a marijuana dealer, whom they intended to rob. York told Tesse he and Morehead had climbed through a window and gotten into a scuffle with someone inside the apartment. York did not say who had actually fired the shot that killed Fidler.

After Fidler's murder, York grew facial hair and moved to Nevada City. He told Tesse he had grown the facial hair so he would not resemble the composite sketch published with the newspaper article about the murder. York also stopped driving his black Escalade in the area where the murder had occurred, because he was afraid that if his car were seen again, it would be recognized from the day of the incident.

On April 30, 2009, the Contra Costa County District Attorney filed an information charging York with first degree murder, attempted residential robbery, residential burglary, and assault with a firearm. The information also contained felony murder special circumstance allegations stating that the murder had been committed while York was engaged in the commission and attempted commission of the crimes of burglary and robbery, within the meaning of section 190.2, subdivision (a)(17).

After a jury trial, York was found guilty as charged, and the jury found the special circumstance allegations true. The trial court sentenced York to serve life without possibility of parole plus three years in state prison. York then filed a timely appeal.

DISCUSSION

York's challenges to his conviction fall into two broad categories. First, he argues the trial court improperly permitted the jury to hear evidence of prior, uncharged home invasions he had allegedly committed, and he contends the prosecutor engaged in misconduct by knowingly eliciting this evidence and referring to it in closing argument. Second, he raises a series of related claims of instructional error, all of which concern the theory of conspirator liability. We will address these arguments in the order in which York presents them.

I. *Alleged Admission of Prior Bad Acts Evidence*

York claims a combination of imprecise trial court rulings and prosecutorial misconduct allowed the jury to hear of other home invasion robberies he allegedly had committed. York contends this violated Evidence Code section 1101, subdivision (a)[2]

[2] Evidence Code section 1101, subdivision (a) provides in relevant part: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (. . . in the form of . . . evidence of

and the due process clause of the Fourteenth Amendment. The problem, as York sees it, "does not conveniently sort itself into a single category of error[.]" York's specific claims are: (1) the trial court failed to ensure the jury would not hear other bad acts evidence previously ruled inadmissible, and (2) the prosecutor committed misconduct by eliciting such evidence in his questioning and by referring to it in his closing argument. Before addressing these claims, we will explain the factual context in which they arose.

A. *Factual Background*

Prior to trial, York moved to exclude evidence that he had "spoke[n] frequently of 'jacking' or 'robbing' other people apart from the incident at hand." He contended this evidence was inadmissible under Evidence Code sections 352 and 1101, subdivision (a) and that none of the exceptions to inadmissibility applied. When the trial court considered York's request to exclude this evidence, the prosecutor explained that the statements at issue indicated York's "ongoing intention" to rob a drug dealer and showed his "specific state of mind."

The trial court ruled that "generalized statements . . . not related to some specific other crime not charged in this case . . . where Mr. York is discussing . . . committing robberies, taking other people's dope, by force, is admissible." The court ruled inadmissible "specific statements" suggesting that York had committed other robberies unrelated to the charged offense.

This issue emerged at trial in the course of testimony by Lauren Lackey Perez and Penny Morales. After Lauren Perez took the stand and was asked whether she had heard York talk about marijuana, the trial court excused the jury so it could prescreen her testimony. Perez testified York was "[a]lways [talking] about robbing people and jacking this person and coming up on this person and doing this to this person." She said that beginning in October 2003, she heard York talking a lot about "jacking people" but explained she did not take him seriously. Perez thought York was bragging and "was talking shit basically."

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specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

After hearing argument from counsel, the trial court ruled it would allow questions about York's statements, because they were relevant both to his mental state or intent and to the identity of "that second person who closed the door." When the jury returned, the prosecutor asked Perez whether she had heard York "talk about . . . jacking people or robbing people or burglarizing people, ripping people off, anything like that?" Perez said York had very often spoken of such matters. She testified that she did not take him seriously and thought he was "a punk kid trying to look like Billy bad ass all of the time." The prosecutor then asked, "Did he mention any specific robberies that he had committed prior to that time?" and Perez responded, "No."

Defense counsel objected, and the trial court instructed the jury to disregard the answer. The trial court denied a defense motion for a mistrial, explaining that the witness's testimony had made clear she had no knowledge of any particular robbery that had taken place prior to the charged offense.

Before Penny Morales testified, the trial court ruled it would allow the prosecutor to ask Morales whether York had told her "he had ever been involved in a home invasion robbery, *singular*." (Italics added.) The court ruled inadmissible references to multiple home invasions.

When Morales took the stand, the prosecutor asked her whether York had told her "he had done a home invasion[.]" Morales said no, and the prosecutor then asked, "Is it your testimony that he never described for you a home invasion that he had done?" Morales responded by saying York "had described one that he had done in – not in California, but somewhere else." The jury was excused, and outside the presence of the jury, Morales clarified that York had not actually told her where he had committed the home invasion to which she referred, but she explained that the conversation in which York talked about the incident had occurred in Nevada. When asked whether York had told her about "more than one home invasion," Morales responded, "He never told me about home invasions." Morales went on to explain that her understanding of what York had told her was that someone else had done a home invasion but the person responsible had been arrested and then pointed the finger at York.

When the jury returned, Morales testified that York had told her he had done at least one home invasion, but had not specified where it occurred. The prosecutor then asked Morales whether York had told her "when in his life" the home invasion had taken place, and Morales responded, "No. He said to me that they had done some when they were younger." After Morales was excused, the trial court admonished the jury about her testimony, stating, "To the extent that any of you might have inferred that there was some reference to some other home invasions or robberies in her testimony, there is not such evidence in this case. [¶] . . . So I'm specifically advising you, to the extent that there is any inference that you might draw from her testimony with respect to some communication of some other acts other than those charged in this case, you may not consider that in any way, shape, or form, in deciding whether or not the charges in this case have been proved."

Defense counsel later moved for a mistrial because Morales's testimony implied there were other "home invasion type robberies out there." The trial court denied the motion, and at defense counsel's request, it agreed to give the jury a limiting instruction.

In his closing argument to the jury, the prosecutor told the jury, "[York] did tell [Morales] that he committed a home invasion earlier when he was younger[.]" Defense counsel requested a side-bar conference, and he later moved for a mistrial, arguing that the prosecutor had implied "that there were other 'plural' home invasion robberies." The trial court denied the mistrial motion, noting that the prosecutor had referred to only one home invasion, and there was evidence before the jury "that there had been a statement about a home invasion in the singular."

B. *The Jury Heard No Evidence of Prior Bad Acts, and Assuming it Did, the Trial Court's Instructions Cured Any Possible Prejudice.*

The People respond to York's challenge to the testimony from Lauren Perez and Penny Morales by contending York's statements indicated a desire to rob a drug dealer and were thus "admissible to show his present intention to do an act in the future." They also contend the statements were circumstantial evidence of York's identity as the second intruder. Both parties agree the trial court could properly admit statements that were

evidence of York's specific state of mind. (See Evid. Code, § 1250, subd. (a).) York argues, however, that the jury did not merely hear testimony about York's statements; he claims the trial court allowed the jury to hear evidence that he committed other uncharged offenses. He contends this violated Evidence Code section 1101 and the due process clause of the Fourteenth Amendment to the federal Constitution. We disagree.[3]

Turning first to Lauren Perez's testimony, we reject York's characterization of it. Perez said only that York often spoke in *general* terms about robbing or "jacking" people. This testimony was admissible under Evidence Code section 1250, subdivision (a). (See *People v. Karis* (1988) 46 Cal.3d 612, 636-637 [defendant's generic statement that he would not hesitate to eliminate witnesses if he committed a crime admissible as evidence of intent].) Perez also said she did not take York seriously, and when asked whether York had mentioned any specific robberies, she answered in the negative. Thus, contrary to York's claims, Perez did not testify about any specific, prior offense. To the extent York asserts the jury may have inferred the existence of prior, uncharged offenses from the prosecutor's question to Perez, the trial judge specifically instructed the jurors that they should not "assume that something is true just because one of the attorneys asked a question that suggested it was true." We must presume the jury followed these instructions. (*People v. Prince* (2007) 40 Cal.4th 1179, 1295.)

York contends Morales's testimony would lead the jury to conclude there had been earlier, uncharged robberies. But after Morales testified that York had described to her a home invasion "he had done in – not in California," the prosecutor asked her whether York had told Morales when in his life the home invasion had occurred. Morales said York had told only her "they had done some when they were younger." Even if we assume that the jury would conclude that "they" referred to York's participation in a group that had committed prior, uncharged robberies, the trial court

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[3] Initially, we note that the People contend York's claim does not raise a federal constitutional violation. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 813.) In his reply brief, York makes no direct response to this point, and we may therefore assume it has been conceded. (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112, fn. 3.)

specifically instructed the jury that there was *no evidence* of other home invasions or robberies in this case. It also told the jury in no uncertain terms that it could not consider any inferences about other uncharged acts in deciding whether York was guilty of the crimes charged. Again, we must presume the jury followed the trial court's instruction. (*People v. Avila* (2006) 38 Cal.4th 491, 574.) Here, given the strength of the language with which the trial court admonished the jury, we find the presumption particularly appropriate.[4] And we do not believe that Morales's ambiguous and "fleeting reference" to another home invasion was " 'so outrageous or inherently prejudicial that an admonition could not have cured it.' [Citation.]" (See *People v. Valdez* (2004) 32 Cal.4th 73, 123 [rejecting claim of prosecutorial misconduct based on detective's allusion to defendant's prior incarceration].)

York's claims of prosecutorial misconduct also fail. To begin with, York's argument on this issue is long on citation but short on analysis. He cites numerous cases containing general propositions of law about what constitutes prosecutorial misconduct, but he makes scant effort to support his claim by tying these cases to the factual circumstances in his case. York's "briefing on the prosecutorial misconduct issue is difficult to follow, making it somewhat challenging to identify his exact claims of misconduct." (*People v. Fuiava* (2012) 53 Cal.4th 622, 679 (*Fuiava*).) As best we can discern, York believes the prosecutor knew or should have known that witnesses would testify to York's admissions of other robberies, although the trial court had ruled such testimony inadmissible. He then asserts that the prosecutor "made sure" the jury would

[4] York seems to argue in his reply brief that the trial court's limiting instructions were ineffective to cure the supposed prejudice he suffered from the admission of allegedly improper testimony. The cases upon which he relies, however, bear almost no resemblance to the one before us, as they concerned circumstances far more egregious than any presented here. (E.g., *People v. Hill* (1998) 17 Cal.4th 800, 845 [jury instructions insufficient to cure cumulative prejudice from multiple errors, including prosecutor's "pervasive campaign to mislead the jury on key legal points, as well as her unceasing denigration of defense counsel before the jury"]; *People v. Coleman* (1985) 38 Cal.3d 69, 93 [limiting instruction insufficient to cure prejudice from expert testimony about letters written by defendant's slain wife in which she claimed defendant had threatened her with violence].)

learn of uncharged robberies and that the prosecutor's questions "left no doubt" that York had admitted such robberies.

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] . . . 'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.' [Citation.]" (*Fuiava, supra*, 53 Cal.4th at p. 679.) Applying these standards, we conclude no misconduct occurred here.

As for the contention the prosecutor knew about York's alleged commission of other robberies, York points to nothing in the record suggesting that the prosecutor had such knowledge. In fact, the prosecutor told the trial court he was not "aware of any other actual prior crimes committed by the defendant." York describes this statement as "disingenuous," but he does not tell us why. He says only that he "can accept that the prosecutor did not know of *specific* prior crimes, [but] rejects the implication that the prosecutor believed there had been none." In the absence of some evidence in the record suggesting the prosecutor was in fact aware York had committed other robberies, we are unwilling to assume the prosecutor had such knowledge.

The prosecutor also did not elicit inadmissible evidence. As explained above, the parties do not dispute that York's general statements about robbing or "jacking" people were admissible under Evidence Code section 1250, subdivision (a). York's challenges to Lauren Perez's testimony are unfounded, because she did *not* testify about a prior, uncharged offense. Indeed, she said York had never mentioned any specific robberies to her. To the extent Morales's testimony might be construed as alluding to York's commission of uncharged offenses, the prosecutor had no reason to anticipate this testimony, since she had testified outside of the presence of the jury that York had told her *someone else* had committed a home invasion and then blamed him for it. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 618-619 [rejecting prosecutorial misconduct claim where prosecutor had no reason to believe witness would mention defendant's

imprisonment], disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

Nor was the prosecutor's argument to the jury improper. Defense counsel's objection to the prosecutor's argument was that the prosecutor had implied York had committed a number of home invasions. As the trial judge correctly recalled, however, the prosecutor spoke about York telling Morales "that he committed *a* home invasion . . . when he was younger[.]" (Italics added.) The prosecutor's argument was nothing more than commentary on the evidence already before the jury. (See *People v. Farnam* (2002) 28 Cal.4th 107, 169 [no misconduct where prosecutor mentioned to jury additional details about defendant's prior conviction, to which defendant had stipulated].)

II. *Alleged Instructional Errors*

York next raises a series of claims of instructional error, most of which challenge the validity of conspiracy as a theory of derivative criminal liability.[5] First, he contends the plain language of section 31 provides no statutory basis for imposing derivative criminal liability on grounds of conspiracy. Second, he argues the first-degree felony murder rule should not apply to a conspirator who does not participate in the offense, regardless of whether conspiracy is a valid basis on which to impose derivative criminal liability. Third, he asserts that first-degree felony murder liability should not devolve upon a conspirator who does not participate in the offense, unless the jury is also required to find the homicide was a reasonably foreseeable result of the conspiracy. Finally, York contends that under the plain language of section 190.2, felony-based special circumstances do not apply to conspirators, because the statute refers only to perpetrators and aiders and abettors. We will address these arguments in turn.

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[5] York concedes his trial counsel did not raise below any of the instructional errors he now asserts on appeal. Nevertheless, he contends the issues are not forfeited because we may address these matter under section 1259, which permits us to "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." The People do not argue otherwise and instead respond to the merits of York's arguments. We will do the same.

A. *Conspiracy as a Theory of Criminal Liability Under Section 31*

"Under California law, a party to a crime is either a principal or an accessory. (§ 30.)" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 523 (*Mohamed*).) Section 31 defines "principals" as "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." York argues the latter section describes only two groups of principals: (1) the actual perpetrators of a crime and (2) those who aid and abet the offense in any of a number of ways. In his view, the statute does not state that it applies to those who conspire to commit an offense. While York acknowledges case law that treats conspirators as principals in a crime, he believes this case law is in conflict with the plain language of section 31 and contends it should be "abrogated." He therefore reasons that the trial court committed reversible error when it instructed the jury that he could be found liable on a conspiracy theory of derivative liability. We are constrained to reject York's argument.

As the People correctly point out, for more than a century, the California Supreme Court has held that defendants may be convicted as principals to crimes in their role as conspirators. (*People v. Kauffman* (1907) 152 Cal. 331, 334.) Only five years ago, our high court stated unequivocally, "One who conspires with others to commit a felony is guilty as a principal. (§ 31.)" (*In re Hardy* (2007) 41 Cal.4th 977, 1025; see *People v. Valdez* (2012) 55 Cal.4th 82, 150 [" 'conspiracy . . . is itself a *theory of liability*' "].) York criticizes the reasoning of this entire line of California Supreme Court case law, but as a lower court, we are obliged to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Moreover, in *Mohamed, supra,* 201 Cal.App.4th 515, the Fourth District recently rejected the very argument York makes here. (*Id*. at pp. 523-525.) After noting that it was bound by controlling California Supreme Court authority, the court went on to conduct its own independent analysis of the language of section 31. (*Id*. at p. 524.) As the *Mohamed* court explained, "The 'all persons concerned' language in section 31 indicates the Legislature intended the definition of principal to apply broadly. [Citation.]

A broad application of the language would necessarily include conspirators. . . . [¶] Moreover, we believe Mohamed misconstrues the language in section 31 clarifying that all persons concerned are principals regardless of 'whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . .' This clarifying language reflects the elimination of the common law distinctions among principals in the first degree, principals in the second degree, and accessories before the fact. . . . [Citations.] Thus, instead of demonstrating a legislative intent to impose limits on the class of persons who are principals, this clarifying language demonstrates a legislative intent to remove previously existing limits. This language, therefore, provides no support for Mohamed's contention that conspiracy is an invalid theory of criminal liability under California law." (*Ibid.*)

We need not express any view on *Mohamed's* reasoning, for we are not free to consider York's argument on the merits.[6] We are bound to apply the California Supreme Court's longstanding rule that one who conspires to commit a felony may be found guilty as a principal. (*In re Hardy, supra,* 41 Cal.4th at p. 1025.) Thus, York's argument necessarily fails.

B. *The Evidence Satisfied the Requirements for Finding York Guilty of First Degree Felony Murder.*

York next argues the first-degree felony murder rule should not apply to a conspirator who neither perpetrates nor aids and abets the underlying felony. York does not challenge the first degree felony murder rule, and he does not dispute that a felony murder occurred here. York's theory is that a "pure conspirator" has no control over how the felony is committed, and that "negligence, carelessness, and accidents are beyond the pure conspirator's control." He therefore argues it does not serve the purpose of the felony murder rule to apply it to a pure conspirator. York is incorrect.

[6] Although the People rely on *Mohamed* in their responsive brief, York's reply brief does not address the reasoning of the case.

York's argument appears to be based on the assumption that the jury might have convicted him of murder solely on the basis of his role as a conspirator in the underlying felonies, although he did not participate in their commission and was not even physically present when they occurred. Yet York does not explain how the jury might have reached such a conclusion based on the evidence at trial. While York objects to application of the first degree felony murder rule "to a non-participating and absent coconspirator," as the People point out, he "has presented no theory, supported by the evidence in this case, under which he could have been found guilty as a conspirator, but not as an aider and abettor or direct perpetrator." York also does not dispute there was abundant evidence he was a direct participant in the burglary, attempted robbery, and murder of Fidler. Given this factual deficiency, we question whether York's claim of instructional error is properly before us, since the trial court had no sua sponte obligation to instruct on issues not fairly raised by the evidence. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204 & fn. 5 (*Cavitt*) [trial court has no sua sponte duty to clarify requirement of logical nexus between homicide and burglary-robbery where evidence raised no issue as to existence of that nexus].)

Even putting aside York's failure to articulate a factual scenario under which he could have been convicted solely as an absent, nonparticipating "pure conspirator," we reject his argument. First, one basis of his argument is that conspiracy is not a valid basis for criminal liability generally. Assuming there were doubts about the validity of conspiracy as a theory of liability, the California Supreme Court's opinion in *People v. Valdez, supra,* 55 Cal.4th 82 has now laid them to rest. The court there agreed with the People's argument that " 'like aiding and abetting, conspiracy . . . is itself a *theory of liability*. . . .' " (*Id*. at p. 150.)

Second, even accepting York's claim that he was not present for, and did not participate in, the underlying felonies, he would not escape liability for the acts of his co-conspirators. As the California Supreme Court has explained, " '[i]t is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts.' [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403,

417; see *Cavitt, supra,* 33 Cal.4th at p. 196 [requisite temporal relationship between felony and homicidal act may exist even if nonkiller is not physically present at time of homicide].) Similarly, even if one accepts York's assertion that "negligence, carelessness, and accidents are beyond the pure conspirator's control," he may still be liable for first degree felony murder. "The issue is not whether a defendant plans or intends to kill. The issue is whether a killing occurred in the course of the commission of a felony and . . . whether that killing aided in the progression and consummation of the felony. How that killing occurred and whether it was intentional are irrelevant." (*People v. Smithson* (2000) 79 Cal.App.4th 480, 502.) First degree felony murder therefore includes "a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident . . . and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* (1983) 34 Cal.3d 441, 477.)

Finally, a nonkiller may be liable for a homicide committed in furtherance of an inherently dangerous felony if there is a causal and a temporal relationship between the underlying felony and the act resulting in death. (*Cavitt, supra,* 33 Cal.4th at p. 193.) "The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.*) Even assuming York was an absent, nonparticipating "pure conspirator," both relationships are present in this case. Under this hypothetical scenario, Fidler's murder occurred while one of York's coconspirators was engaged in burglary and attempted robbery and there was a logical nexus between those crimes and the murder. (*Id.* at p. 202; see *People v. Kelly* (2007) 42 Cal.4th 763, 788 ["Murders are commonly committed to obtain money or other property"].) The requisite temporal relationship would also exist, because the underlying felonies and the murder were all part of one continuous transaction, with the murder occurring during the commission of the burglary and attempted robbery. (*Cavitt, supra,* 33 Cal.4th at p. 203.)

We can therefore conclude, beyond a reasonable doubt, that the jury's verdict was based on a legally valid theory of criminal liability. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1203.) Accordingly, we reject York's claim of error.

C. *Fidler's Murder Was a Reasonably Foreseeable Result of the Conspiracy.*

York next argues that the first degree felony murder rule should not apply to a conspirator who neither perpetrates nor aids and abets the underlying felony, unless the murder was a reasonably foreseeable result of the conspiracy. He asserts that it was error to instruct the jury that it could apply the first degree felony murder rule without requiring what he terms "a 'reasonable foreseeability' nexus between the conspiracy and the homicide." York cites no cases supporting his position, but his argument is taken from the Related Issues note to CALCRIM No. 540B, which observes that the California Supreme Court "has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy." (CALCRIM No. 540B (2012 ed.) Related Issues, p. 304.) No precedent supports York's claim, and he identifies no facts that would have required the trial court to give the instruction he proposes. Moreover, even if there were a requirement that the murder be a reasonably foreseeable result of the conspiracy, such a requirement would have been satisfied here, and thus York suffered no prejudice.

York's argument seeks to distinguish the liability of a conspirator from that of an aider and abettor, but California precedent has consistently applied the same felony murder analysis to coconspirator liability as it applies to aider and abettor liability. " 'For purposes of complicity in a cofelon's homicidal act, 'the conspirator and the abettor stand in the same position.' " (*People v. Valdez, supra,* 55 Cal.4th at p. 150, quoting *People v. Pulido* (1997) 15 Cal.4th 713, 724.) In *People v. Pulido,* the California Supreme Court observed that "[i]n stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations.]" (*People v. Pulido, supra,* 15 Cal.4th at pp. 724-725.)

The Supreme Court has also referred to the liability of "cofelons" or "accomplices" without regard to whether liability is based on actual commission of the offense, aiding and abetting, or conspiring to commit the offense. (*Cavitt, supra,* 33 Cal.4th at pp. 197-205; *People v. Billa* (2003) 31 Cal.4th 1064, 1072.)

At trial, York did not request the instruction he now claims should have been given, and on appeal he fails to refer us to facts in the record that would have supported it. If, as he claims, the "requisite nexus" between the conspiracy and the homicide necessitated a showing of reasonable foreseeability, then it was York's obligation to request that the jury be instructed on that point. (*Cavitt, supra,* 33 Cal.4th at p. 204.) But in the absence of any showing that this was an issue raised by the evidence and connected with the facts of the case, the trial court was not required to instruct on any reasonable foreseeability nexus "without regard to whether the evidence supports such an instruction." (*Ibid.*)

In any event, even if we were to accept York's novel argument that California law requires that there be a reasonable foreseeability nexus between the conspiracy and the homicide, the evidence in this case shows the murder of Fidler was a reasonably foreseeable consequence of the intended offenses of robbery and burglary. And even under York's view of the case, these were offenses he conspired to commit. Thus, any alleged instructional error could not have prejudiced York. A trial court is obligated to instruct the jury on general principles of law relevant to the issues raised by the evidence, but has no duty to instruct on a defense where there is no evidence which a reasonable jury could find persuasive. (See *People v. Bohana* (2000) 84 Cal.App.4th 360, 370-371.) "[W]hen one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688.) The evidence in this case justified the conclusion that the murder was committed to facilitate burglary and attempted robbery. The evidence showed that Fidler, the murder victim, was the intended target of the burglary and attempted robbery and that the use of violence to commit those offenses was highly probable. One of the perpetrators used a gun to assist him in robbing Fidler, and use of the gun was a highly

foreseeable method of convincing a drug dealer to hand over drugs and money. Indeed, York points to no evidence that Fidler was murdered for any reason *other* than to facilitate the attempted robbery and burglary. Consequently, even if we were to apply York's proposed reasonable foreseeability requirement to the facts of this case, the evidence would have satisfied that requirement.

D. *The Requirements of Section 190.2 Were Satisfied.*

York's final argument is that the trial court erred in instructing the jury that conspiracy was a third and alternative theory of special circumstance liability. The trial court instructed the jury that it could find the special circumstance true if the People proved six things, and the instruction included language stating the prosecution could prove certain elements of special circumstance liability based on York's membership in a conspiracy to commit both the underlying felonies and the act resulting in Fidler's death. (See CALCRIM No. 730.) York reasons that subdivisions (c) and (d) of section 190.2 say nothing about conspiracy or conspirators, and thus there is nothing in that section to bring a member of a conspiracy within the statute's coverage.[7] Because California is a "code state" and criminal liability is based solely upon statute, York argues the plain language of section 190.2 may not be interpreted to apply to conspirators. As York puts it, "If section 190.2 does not apply to conspirators, neither the CALCRIM authors nor this court can declare it to apply to conspirators."

[7] Section 190.2 provides in pertinent part: "(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4. [¶] (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." (§ 190.2, subds. (c), (d).)

The fundamental flaw in York's argument is that he focuses on what section 190.2 does not say, rather than on what it does. The statute provides that under certain circumstances, a "major participant" in the commission of an enumerated felony will receive the same punishment as the actual killer. (§ 190.2, subd. (d).) Special circumstance liability attaches under this section if: (1) "with reckless indifference to human life," the major participant "aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission" of that felony, and (2) the felony "results in the death of some person or persons[.]" (§ 190.2, subd. (d).)

As the People point out, the evidence at trial satisfied the requirements of the statute. York and Tyson Morehead, a black male, had discussed robbing a drug dealer in Pleasant Hill the day before the murder was committed. Connelly saw two intruders in Fidler's apartment on the night of the murder, one of whom was a black male carrying a small chrome revolver. Connelly testified York looked like the second intruder. York later went to the Nevada City property and talked about hiding or getting rid of a chrome handgun he had with him.

While at the Nevada City property, Bryan Hart heard York say he had been with a "nig" (a black man) when things went bad. After Fidler's murder, York told Tesse Perez that "he went to go jack somebody that things went bad and the gun had gone off." York explained to her that he and Morehead had "scoped out" an apartment because York "was going there to jack somebody for marijuana." York and Morehead entered the apartment through a window and got into a scuffle with someone inside. A shot was fired, although York did not tell Tesse Perez who had fired it.

From this evidence, the jury could reasonably have concluded York was a "major participant" in the attempted robbery and burglary. (See *People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580 [appellant was major participant where he was one of only two people involved in commission of robbery and murder].) The use of a gun during the crime justified a finding that York acted with reckless disregard for human life. (See *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1116-1117 [defendant acted with reckless disregard for human life where she knew codefendant had a gun, lured victim into alley,

and failed to assist victim after hearing gunshot].) There also can be no dispute that the attempted robbery and burglary resulted in Fidler's death. On these facts, the jury could certainly return a true finding on the special circumstance.

Faced with this evidence, York presents us with no factual theory under which he might have been found guilty only as a conspirator but not as a direct participant or an aider and abettor. Thus, York's hypothetical claim that section 190.2 should not apply to persons York calls "pure conspirators" is one we need not address. As we are not faced with an evidentiary record from which a reasonable juror might find York guilty solely on the basis of his role as an absent, nonparticipating conspirator in the felony murder, York's challenge to the special circumstance instructions must fail. (See *Cavitt, supra,* 33 Cal.4th at p. 204 [trial court has no sua sponte duty to clarify felony murder instructions "without regard to whether the evidence supports such an instruction"].)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

_____

Needham, J.